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CYBER VILLAGE SDN BHD

v.

ILLUSTRA IT (M) SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D1-22-2108-2008]
9 JULY 2010

C ***COMPANY LAW:*** *Directors - Director's responsibility for fraudulent trading - Section 304 Companies Act 1965 - Whether business of company conducted with intent to defraud creditors - Whether company's acts constituted "carrying on of business of the company" - Whether directors knowingly a party to carrying on of business in that manner -* D *Burden and standard of proving requisite ingredients of s. 304(1) - Whether company's negative financial position was known to creditors - Whether creditors should have investigated creditworthiness of company - Whether fraudulent trading established - Whether corporate veil to be lifted*

E ***COMPANY LAW:*** *Directors - Recovery of debt against director - Whether business of company conducted with intent to defraud creditors - Whether company's acts constituted "carrying on of business of the company" - Whether directors knowingly a party to carrying on of business in that manner - Burden and standard of proving requisite* F *ingredients of s. 304(1) - Whether company's negative financial position was known to creditors - Whether creditors should have investigated credit-worthiness of company - Whether fraudulent trading established - Whether corporate veil to be lifted - Companies Act 1965, s. 304(1)*

EVIDENCE: *Documentary evidence - Presumptions as to documents* G *produced as record of evidence - Reference made to earlier judgment debtor summons proceedings - Whether certified or true copies of JDS proceedings required - Whether record of proceedings to be presumed to be duly and regularly taken - Whether maker to be called - Evidence Act 1950, s. 80*

H Pursuant to an agreement, the plaintiff created an education website and supplied computer hardware and software to the 1st defendant. Invoices totalling RM50,492 were issued, but the 1st defendant failed to pay. An action was filed in the Sessions Court and default judgment was entered. Since the 1st defendant again I failed to pay this judgment debt, the plaintiff commenced execution proceedings. The 3rd defendant (a director of the 1st

defendant) attended court and was examined under a judgment debtor summons (JDS). The answers given by the 3rd defendant at the JDS proceedings led to the filing of this action. According to the plaintiff, the 3rd defendant had testified at the JDS proceedings that the 1st defendant had ceased operations around 2001 and was insolvent; that the 1st defendant was unable to settle its debts, including those owed to the plaintiff; and that the 1st defendant did not have any assets whatsoever. The plaintiff claimed that this evidence proved that the defendants, or the principal directors of the 1st defendant had carried on the business of the 1st defendant with the intent of avoiding payment; and had fraudulently misrepresented to the plaintiff on its ability to pay for the goods purchased when it knew or had notice that the 1st defendant was insolvent at the time of contracting. The plaintiff prayed for the court to lift the corporate veil of the 1st defendant and find the principal directors personally liable for the judgment sum since they were the alter ego of the 1st defendant. The defendants disputed the records of the JDS proceedings and asserted that the 1st defendant did not cease operations in 2001; that it was able to pay for the goods at the material time; and that it was *bona fides* in its conduct of business. The 1st defendant was still an on-going concern.

Held (dismissing the plaintiff's claim without costs):

(1) The 1st defendant's contract with the plaintiff for the purchase of computer hardware and software was part and parcel of the business carried on by the 1st defendant. While the original principal business of the old named company was to provide barge services, there was no suggestion that the 1st defendant was not authorized to contract for the supply of computer hardware and software at the material time. Clearly, the 1st defendant's acts constituted "carrying on of business of the company" under s. 304(1) of the Companies Act 1965 ("s. 304(1)"). (para 9)

(2) The plaintiff bore the burden of proving the requisite ingredients of s. 304(1). Section 304(1) has clearly prescribed a burden of proof that is not the same as that generally required for fraud-based claims in civil proceedings. What the plaintiff needed to prove was arguably a lower standard of "it appears" that the business of the 1st defendant had been conducted with the intent to defraud the plaintiff or for any other fraudulent purpose. (paras 10 & 11)

(3) The cumulative effect of s. 80 of the Evidence Act, 1950 was that certified or true copies of the JDS proceedings were not required due to the presumption afforded. The record as presented was to be presumed to be duly and regularly taken and the maker need not be called. (para 17)

(4) The evidence recorded at the JDS proceedings and the 1st defendant's audited accounts and the report filed with the Companies Commission of Malaysia by themselves did not prove that there was intent to defraud in the manner claimed by the plaintiff. It had to be shown that the 1st defendant's negative financial position in 2001 was not known to the plaintiff. The financial position painted to the plaintiff must have been one which was quite entirely different with intent on the part of the 1st defendant and the principal directors to never pay the plaintiff thereby causing economic loss to the plaintiff. (para 27)

(5) The underlying contract between the plaintiff and the 1st defendant was one between two companies contracting at arm's length. Thus, it was reasonable to expect the parties to act as prudent commercial concerns. Such concerns would surely have taken steps to assure themselves as to the creditworthiness of the other party before entering into negotiations or finalizing any transactions. There was ample evidence of the plaintiff taking conscious steps to satisfy itself of the 1st defendant's financial status. (paras 27 & 28)

(6) There was no fraudulent trading. It did not appear that there had been any intent to defraud, be it on the part of the 1st defendant or the principal directors, whether in the manner suggested by the plaintiff or at all. There was no reason to lift the corporate veil and find the principal directors personally liable under s. 304(1). (para 32)

Case(s) referred to:

LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Re William C Leitch Bros Ltd (No. 1) [1932] All ER Rep 892 ***(refd)***

Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 304(1)
Debtors Act 1957, s. 4(6)
Evidence Act 1950, ss. 17, 18, 80, 114(e), (g)
Rules of the High Court 1980, O. 48 rr. 1, 3
Subordinate Courts Rules 1980, O. 37 r. 15(4)

Companies Act 1929 [UK], s. 275(1)

For the plaintiff - KC Chan (Kothai Ramamoorthy with him) M/s FL Foo & Co
For the defendants - Rozlan @ Malcolm Murphy; M/s Rozlan Khuen

Reported by Amutha Suppayah

JUDGMENT

Mary Lim JC:

Background Facts

[1] Pursuant to an agreement dated 30 January 2002, the plaintiff created an education website and supplied computer hardware and software to the 1st defendant. Invoices totalling RM50,492 were issued, but the 1st defendant failed to pay. An action was filed in the Sessions Court in Kuala Lumpur (No. 35-52-1018-2003) and on 21 June 2004, default judgment was entered for the sum of RM50,492 together with interest at 8% per annum from the date of judgment to the date of realization and costs of RM11,330. The 1st defendant again failed to pay this judgment debt.

[2] So, the plaintiff commenced execution proceedings. On 8 April 2008, the 3rd defendant attended court (No. 55-56-636-2006) and was examined under a judgment debtor summons [JDS]. The answers given by the 3rd defendant at the JDS proceedings gave the plaintiff reason for complaint and led to the filing of this action. The action has since been discontinued against the 4th defendant.

[3] According to the plaintiff, the 3rd defendant gave the following evidence at the JDS proceedings:

A (a) bahawa Defendan Pertama telah berhenti beroperasi pada sekitar 2001 dan boleh dianggap sebagai insolven;

(b) bahawa Defendan Pertama tidak mempunyai kebolehan untuk membayar hutang-hutang kepada pemiutang, termasuk Plaintif; dan

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(c) bahawa Defendan Pertama tidak mempunyai sebarang asset.

[4] In summary, the 3rd defendant is said to have testified that the 1st defendant ceased operations around 2001 and may be treated as insolvent; that the 1st defendant was unable to settle its debts, including those owed to the plaintiff creditors; and that the 1st defendant did not have any assets. The plaintiff claim that this evidence proves that at the material time, the defendants, the principal directors of the 1st defendant had carried on the business of the 1st defendant with the intent of avoiding payment; and had fraudulently misrepresented to the plaintiff on its ability to pay for the goods purchased when it knew or had notice that the 1st defendant was insolvent at the time of contracting. The plaintiff alleged that these principal directors owed fiduciary, common law and statutory duties to carry on the business of the 1st defendant honestly and in good faith. The plaintiff now wants this court to lift the corporate veil of the 1st defendant and find the principal directors personally liable for the judgment sum since they were the alter ego of the 1st defendant.

[5] In defence, the defendants disputed the records of the JDS proceedings and asserted that the 1st defendant did not cease operations in 2001; that it was able to pay for the goods at the material time; and that it was *bona fides* in its conduct of business. In fact, the 1st defendant is still an on-going concern.

Findings Of The Court

[6] The plaintiff's case is founded on s. 304(1) of the Companies Act 1965 which provides:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any person who was knowingly a

party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[7] In *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68, 78, the Court of Appeal expressed the view that whether a case falls within the ambit of s. 304(1) and whether it is fit and proper to make the declarations sought and make the directors personally liable are really questions of fact:

The section is very clear. It is a matter of making a finding of facts and decide whether the facts fit the provision of the subsection or not.

[8] Towards this end, there must first be established that the business in question is one which is carried on by the 1st defendant before the issue of intent to defraud the plaintiff in the manner identified by the plaintiff is addressed. In *Siow Yoon Keong*, the Court of Appeal had no hesitation in finding that the business of the company was being carried out at the material time. It held that the director of the company had a clear intention to defraud when he used the company's funds for a fraudulent purpose, whether under civil or criminal law. In that case, the director, the alter ego of the company had invested in the share market under his own name. When he realized that he was going to incur losses, he caused a resolution to be passed by the board of directors to ratify the investments and the use of the company's funds, thereby passing his losses to the company. At p. 78, the Court of Appeal said:

Was the business of the company being carried out? We have no problem answering the question in the affirmative, without even referring to any of the authorities. Resolution was passed to ratify the investments and the use of the company's funds for the purpose of investments, perhaps more correctly, "speculations". The company's funds were used to pay the losses of the appellant. Rosen, to whom RM423,000 was due, was not paid. These acts in our view constitute "carrying on of business of the company."

[9] Similarly, I have no hesitation in concluding that the 1st defendant's contract with the plaintiff for the purchase of computer hardware and software is part and parcel of the business carried on by the 1st defendant. While the original

principal business of the old named company was to provide barge services, there is no suggestion that the 1st defendant was not authorized to contract for the supply of computer hardware and software at the material time. It was also not suggested that the 1st defendant cannot on-sell these same goods to another company. The words "... any business of the company has been carried on ..." encompass a wide variety of activities and transactions that a company generally gets itself involved in. Clearly, the 1st defendant's acts constitute "carrying on of business of the company" under s. 304(1) of the Companies Act.

[10] Undeniably, it is the plaintiff who bears the burden of proving the requisite ingredients of s. 304(1). However, the parties do not agree on the standard of proof that must be met. The defendants argued that the plaintiff's case must be established beyond reasonable doubt relying on the Federal Court decision in *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 whereas the plaintiff relied on the provisions of s. 304(1) itself as was the case in *Siow Yoon Keong*.

[11] The Federal Court in *Yong Tim v. Hoo Kok Chong & Ano*r laid down the test for fraud in civil claims. At p. 234, the Federal Court said that "Where fraud has been raised, we agree with the Court of Appeal in *Adorna Properties Sdn Bhd*, that the Malaysian courts have consistently applied the Atkin test; ... that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt." That test has been consistently and diligently applied. But, in the context of section 304(1) of the Companies Act, a specific test has been prescribed and in *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68, 80, Abdul Hamid Mohamed JCA [as he then was] observed these critical words in s. 304(1) itself:

> Note that the section only uses the term "if it appears" which indicates that a lower degree of proof is required.

[12] Section 304(1) has clearly prescribed a burden of proof that is not the same as that generally required for fraud based claims in civil proceedings. What the plaintiff needs to prove is arguably a lower standard of "it appears" that the business of the 1st defendant had been conducted with the intent to defraud the plaintiff or for any other fraudulent purpose. Parliament may have its reasons for choosing this lower standard but that is not

relevant for the purposes of this case or even for determining the immediate issue. What is paramount is that the burden must be discharged by the plaintiff. And, the plaintiff strives to discharge this burden by relying on the notes of evidence recorded at the JDS proceedings as conclusive proof of admissions that there was intent to defraud when the 1st defendant contracted with the plaintiff for the supply of computer hardware and software with the intent of avoiding payment or not paying at all. From this same evidence, the plaintiff submitted that it appears that the principal directors were parties to the 1st defendant's intent as they knew full well that there was no real possibility of the plaintiff being paid as the 1st defendant was insolvent. The plaintiff sought to corroborate the evidence from the JDS proceedings with the 1st defendant's audit and CCM reports and oral testimonies. Each of those pieces of evidence will now be examined.

The Notes Of The JDS Proceedings

[13] The notes of evidence recorded during the JDS proceedings can be found in bundle A1 where the authenticity of the documents is not challenged. The salient parts of the 3rd defendant's evidence are:

(a) My company no longer operating. Company considered (sic) insolvent around 2001 ie, has no ability to repay the debt accumulated.

(b) My company has no assets all rented.

(c) No fund to repay the Plaintiff because back to back.

[14] According to Mr KC Chan, learned counsel for the plaintiff, the presumption in s. 80 of the Evidence Act 1950 should apply to these records. Being notes of evidence recorded as part of the regular acts of the Sessions Court judge, read together with ss. 17, 18 and 114(e) of the Evidence Act 1950, the statements must be presumed to be true and amounting to admissions of the matters complained of, that is, that the 1st plaintiff ceased operation; had no assets and was not able to pay its debts; all since 2001. Such evidence is corroborated by the evidence of PW2, the solicitor who conducted the JDS proceedings. He confirmed the answers set out were indeed the answers given by the 3rd defendant. He further confirmed that the JDS notes as found in the bundle of documents fairly described the JDS proceedings.

[15] The defendants have challenged the admissibility of the notes on several grounds. First, Mr Rozlan @ Malcolm Murphy, learned counsel for the defendants submitted that the maker of the notes, the Sessions Court judge ought to have been called to give evidence of the contents of the notes since the truth of the contents were challenged. The notes also should be rejected because the original, sealed or certified true copy was not tendered. Next, he challenged the oral testimonies. According to him, the evidence of Shieh Yee Bing (PW1), the plaintiff's executive director and Pua Kiam Wee (PW3), the plaintiff's Chief Executive Officer at the material time, must be disregarded as neither testified at the JDS proceedings. PW2, on the other hand was suggested to be not a credible witness as his conduct of the JDS proceedings was said to be wanting. A list of questions prepared by PW2 to assist him in the JDS proceedings was adduced but not the notes that PW2 purportedly recorded. The court was invited to draw an adverse inference under s. 114(g) of the Evidence Act 1950 by reason of the plaintiff's failure to tender PW2's notes. Finally, the JDS notes of proceedings are said to be defective and thereby inadmissible for non-compliance of O. 48 r. 3 of the Rules of the High Court 1980 (RHC 1980). It is the defendants' submission that the lack of provisions on the procedure in JDS proceedings under O. 37 of the Subordinate Court Rules 1980 (RSC 1980) created a lacuna which was to be filled by O. 48 r. 3 RHC 1980. Order 48 r. 3 required the Sessions Court judge to read back to the 3rd defendant the evidence recorded during the JDS proceedings and for the 3rd defendant to then sign against that record. Learned counsel for the defendants submitted that the failure to undertake that process rendered the notes inadmissible.

[16] It is regrettable that the defendants have objected to the admissibility of the JDS proceedings in the face of s. 80 of the Evidence Act 1950. More so when these records are housed in bundle A1 which contains documents where their authenticity is not in issue. Section 80 of the Evidence Act provides:

> Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken

in accordance with law and purporting to be signed by any Judge, Sessions Court Judge or Magistrate or by any such officer as aforesaid, the court shall presume that: A

(a) the document is genuine;

(b) any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and B

(c) such evidence, statement or confession was duly taken.

[17] The cumulative effect of s. 80 is that certified or true copies of the JDS proceedings are not required due to the presumption afforded. The record as presented is further presumed to be duly and regularly taken and the maker need not be called. C

[18] In any case, the plaintiff offered corroborative evidence of the evidence recorded by calling Ng Si Seng (PW2), the solicitor who conducted the JDS proceedings. PW2 has no interest in the JDS proceedings or indeed the current proceedings, except in a professional capacity. More importantly, he owes a duty to assist this court in arriving at the truth as to what transpired at the JDS proceedings. The defendants attempted to discredit his evidence by attacking a list of questions prepared and used by PW2 during the course of the JDS proceedings. That list is peppered with mistakes and was never tendered and marked as an exhibit. Having heard PW2's testimony, I find him to be truthful and credible. He has offered honest credible explanations as to the "state" of that list of questions; that the list was meant as a precedent to guide him towards posing the appropriate questions at the JDS proceedings. That list used by PW2 is really no different from that generally prepared by most solicitors as part of their preparatory work in any proceedings. It is typical in this day and age to use boiler-plate or template "cut and paste" precedents. It is not wrong but it must be used with care. Of greater significance is the fact that PW2 confirms that the answers recorded were those indeed given by the 3rd defendant. I shall come back to this a little later. D E F G H

[19] Moving on to the matter of the application of O. 48 r. 3 RHC 1980, I find this argument without merit. It is often overlooked that the substantive law on debtors, and that is what the 1st defendant is, is to be found in the Debtors Act 1957 I

(Act 256). Section 4(6) of Act 256 which states "Upon examination or non-appearance as aforesaid the court may order the judgment debtor to pay the judgment debt either (a) in one sum whether forthwith or within such period as the court may fix; or (b) by such installments payable at such times as the court may fix" clearly allows the court examining the debtor to make certain orders concerning payment of the debt due. The SCR 1980 provides for the same. However, the procedure in the High Court differs in that leave is sought for the examination to be done before a registrar. Upon leave being granted, the debtor attends before the registrar and is orally examined on a prescribed format and addressing the questions found at O. 48 r. 1. The registrar is not empowered to make any orders regarding payment. In the lower courts, the JDS proceedings including the examination of the debtor are conducted by the court itself. After examination of the debtor, O. 37 SCR 1980 empowers the court which conducted the examination to determine the question of liability on the evidence then before it or may order the issue of liability to be tried in such other manner as it thinks fit - see O. 37 r. 15(4). There is no equivalent provision under the Rules of the High Court.

Audit Report And CCM Report

[20] Turning now to the 1st defendant's audited accounts and the report filed with the Companies Commission of Malaysia (CCM report). In the CCM report filed for the financial year of 2001, it can be seen that the 1st defendant had only RM100 as current assets with RM108,510 as current liabilities. The revenue raised was "0". In the Audited Report prepared for Honisa Shipping Agencies Sdn Bhd, the old name for the 1st defendant, these were the reservations of the auditors:

> The accounts have been prepared on a going concern basis which contemplates the realization of assets and the liquidation of liabilities in the normal course of business. As at 31 March 2001, the Company's current liabilities exceeded current assets by RM108,410 and there was a deficit in shareholder's funds of RM108,410. The continuation of the Company as a going concern is dependent on the continued support of its creditors.

[21] However, Mr Murphy argued on behalf of the defendants that these reports ought to be disregarded because the respective makers were not called. I find the defendants' submission

untenable. These are reports prepared under the law and whose only source of information can only be derived from the 1st defendant and where the 2nd and 3rd defendants are its directors. In any case, these documents too were parked in the bundle containing documents whose authenticities are rightly, not challenged. As such, the contents of these documents mean exactly as stated, that the 1st defendant had liabilities that far exceeded its assets.

[22] Now, coming back to the central question posed - do these pieces of evidence taken either together or individually, prove the plaintiff's case? Did the 1st defendant contract with the plaintiff with the intention of avoiding payment or with no intention of ever paying the plaintiff? Did the 1st defendant misrepresented to the plaintiff on its ability to pay for the goods purchased? Were the principal directors knowingly parties to the carrying on of the 1st defendant in the manner identified? Did they know that there was no real possibility of the plaintiff being paid as the 1st defendant was insolvent? Again, this is a question of fact as held by the Federal Court in *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55 where Raja Azlan Shah CJ (Malaya) (as HRH then was) said:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, ie, dishonesty of some sort" for which the registered proprietor is a party or privy. "Fraud is the same in all courts, but such expressions as 'constructive fraud' are … inaccurate;" but "'fraud' … implies a wilful act, on the part of one, whereby another is sought to be deprived by unjustifiable means, of which he is entitled." (per Romilly MR in *Green v. Nixon*). Thus in *Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd* it was said that "if the designated object of a transfer be to cheat a man of a known existing right, that is fraudulent ..."

[23] This Federal Court decision was recently applied in *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 4 CLJ 849 in the context of s. 304(1). At p. 861, the learned judge said:

> The second issue to be determined is whether the business of IDSM has been carried on "with intent to defraud creditors … or for any fraudulent purpose" within the meaning of section 304(1)? What is an intent to defraud? It is an intent to deprive

creditors, or some creditors, of an economic advantage or inflict upon them some economic loss (*Coleman v. The Queen* [1987] 5 ACLC 766). What is fraud? The existence of fraud is a question of fact. It is dependent on the circumstances of each particular case as stated by the Federal Court in *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] ...

[24] In *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors*, the High Court took the opportunity to examine a range of decisions which had interpreted the words "with intent to defraud creditors ... or for any fraudulent purpose" to include:

> (i) a situation where a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts ...; (ii) that fraud in the context of fraudulent trading constitutes 'actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame' ...; (iii) where a person who takes part in the management of a company's affairs obtains credit or further credit for the company when he knows that there is no reason for thinking that funds will become available to pay the debts when it becomes due or shortly thereafter ...; (iv) where a company accepted the purchase price in advance knowing that it would not supply the goods and would not repay the advance paid ...; and (v) a person was knowingly party to the business of a company having been carried out with intent to defraud creditors if at the time when the debts were incurred by the company he had no good reason for thinking that funds would be available to pay those debts when they became due or shortly thereafter and there was dishonesty involving real moral blame according to current notions of fair trading ... Whether there was any intention on the part of the defendants to defraud or to carry out any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, especially the concealment of material facts ...

[25] Yet another case to illustrate how the question of fraud is established is that of *Re William C Leitch Bros Ltd (No. 1)* [1932] All ER Rep 892. Maugham J found s. 275(1), the equivalent provision in the English Companies Act, violated when a company continues to carry on business and to incur debts at a time where there is, to the knowledge of the directors, no reasonable prospect

of the creditors ever receiving payment of those debts. In such circumstances, it would be proper to infer that the company is carrying on business with intent to defraud within the meaning of s. 275(1).

[26] The plaintiff argued that its case has been proved not just by the records of the JDS proceedings, the audit and CCM reports but also by the oral testimonies of the 2nd and 3rd defendants given during the trial. Insofar as the audit reports are concerned, Shieh Yee Bing (PW1) the e-business director or consultant of the plaintiff at the material time testified that that reservation meant that the "1st defendant is in bad financial shape. As at 31 March 2001 the 1st defendant's liabilities exceed its asset. The 1st defendant is a going concern and dependent on the continued support of its creditors". In relation to the testimonies of the 2nd and 3rd defendants, both of them are alleged to be unreliable having given inconsistent evidence. The 2nd defendant because he maintained that the 1st defendant was not insolvent in 2001 despite being confronted with the CCM and audit reports. The 3rd defendant because he had given inconsistent answers subsequent to those given at the JDS proceedings. First, through his affidavit (encl. 26) filed in response to the plaintiff's application to strike out the defence and the entry of summary judgment and later, through his oral testimony during this trial. In each situation, the 3rd defendant attempted to explain or clarify what he meant when he said at the JDS proceedings that the 1st defendant was insolvent in 2001, that it had cash-flow problems or was "balance sheet insolvent" in 2001. At the end of the day, each effort was really to say that the recorded evidence at the JDS proceedings is erroneous and that what he meant was that the 1st defendant was insolvent in 2008 and not, in 2001.

[27] In my judgment, the evidence recorded at the JDS proceedings and the audit and CCM reports are as presented. But, by themselves, those pieces of evidence do not prove that there is intent to defraud in the manner claimed by the plaintiff. It must also be shown that the 1st defendant's negative financial position in 2001 was not known to the plaintiff. Instead, the financial position painted to the plaintiff was one which was quite entirely different with intent on the part of the 1st defendant and

A the principal directors to never paying the plaintiff thereby causing economic loss to the plaintiff. It must not be forgotten that the underlying contract between the plaintiff and the 1st defendant is one between two companies contracting at arm's length. As such, it would be reasonable to expect these parties to act as prudent
B commercial concerns. Such concerns would surely have taken steps to assure themselves as to the credit-worthiness of the other party before entering into negotiations or finalizing any transactions.

C **[28]** In the facts of this case, there is ample evidence before me of the plaintiff taking conscious steps to satisfy itself of the financial status of the 1st defendant. The dealings and negotiations between the plaintiff and the 1st defendant were in fact transacted and concluded by its then chief executive officer, Pua
D Kiam Wee (PW3). He testified that the "1st defendant appeared to be in good financial shape". He had conversations with the 3rd defendant where he was assured of the 3rd defendant's status as one of the 1st defendant's directors. The 3rd defendant told him of the 1st defendant's success in securing a contract worth more
E than RM30 million and was shown contract documents between the 1st defendant and its clients. PW3 had also visited premises of the 1st defendant and the end-clients. He was further told by the 3rd defendant that he, the 3rd defendant was from a wealthy family in Ipoh and would not have any problem making good the
F terms of the contract. Finally, he testified that the 3rd defendant represented to him that he had the backing of wealthy and reputable investors. Although PW3 never directed specific questions on the financial status of the 1st defendant, he had "derived assumption that they were in a good financial position"
G after "having gone through the process of getting to know the client, visiting sites ..." The 1st defendant in fact paid a deposit of RM5,000. To me, all these steps and efforts undertaken by the plaintiff would not have been necessary but for the poor or bad financial shape of the 1st defendant which the plaintiff was aware
H of. Despite the 1st defendant's position, the plaintiff contracted with the 1st defendant.

[29] I am satisfied that whatever concerns the plaintiff might have had on the 1st defendant's financial abilities to settle monies due
I under the contract, such concerns were allayed by the 3rd defendant's representations on his family background and the fact

that he had the backing of wealthy and reputable investors; PW3's visits to the premises and his scrutiny of the on-sell contracts. Mr Chan had urged this court to disregard the on-sell contracts because some of them remained marked for identification purposes only and had not been admitted in evidence while some were made after the plaintiff's contract with the 1st defendant. I have carefully examined these on-sell contracts that the 1st defendant made with others and, I find them real and genuine. These contracts do indeed exist. In fact, the contract between the parties makes specific reference to the role of the 1st defendant as the main contractor in a contract to develop an education website and that the 1st defendant had appointed the plaintiff as its subcontractor. There is also evidence of the defendants' attempts at recovery of the debts due from the company to whom the goods had been on-sold. Although police reports have been made and professional debt recovery agents and solicitors engaged in such efforts were not successful in their attempts to secure payments. These efforts were made early in 2003 and are consistent with the assertions that such efforts were genuine.

[30] Now, whether these contracts and the payments or related arrangements for payments to the plaintiff are on a back-to-back understanding or otherwise is irrelevant here. The application and interpretation of these contracts and the underlying contract between the parties would have been appropriate issues for determination by the Sessions Court had the defendants saw fit to file a defence. No defence was filed and a final default judgment was entered against the 1st defendant. It is not only too late but wrong to now examine those issues. The process of the High Court or any court cannot and must not be abused in order to circuitously revisit what is otherwise a closed issue.

[31] It is unfortunate that a claim of this nature has to be filed. The judgment of the Sessions Court is a valid judgment which must be respected and complied with by the defendants. Companies are only as good as the people who run them. The 2nd and 3rd defendants are directors of particular calibre and qualifications who ought to exercise a greater degree of accountability. Arguments on back-to-back arrangements and other similar issues are obviously issues of defence which rightly should have been canvassed at the trial of the original claim by the plaintiff. For reasons best known to the defendants, they were

not, and a final judgment, though by default, has been entered. It is only proper and in keeping with good corporate governance that directors as well as companies act responsibly in every sense and ensure that court orders are promptly complied with. More so when the defendants have made no efforts to set aside that judgment or where the judgment stands, as it does today. Be that as it may, the plaintiff is not without remedy since the 1st defendant claims to be a viable on-going concern. There are options available for the plaintiff to see to the enforcement of the judgment and for recovery of the judgment debt.

[32] In the circumstances, I am not convinced that there is fraudulent trading. It does not appear that there has been any intent to defraud, be it on the part of the 1st defendant or the principal directors, whether in the manner suggested by the plaintiff or at all. There is no reason to lift the corporate veil and find the principal directors personally liable under s. 304(1) of the Companies Act 1965. The plaintiff has not proved its case and accordingly, I dismiss the plaintiff's claim. Finally, having regard to the conduct and circumstances of the case, I direct each party to bear its own costs.